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Contents

ARREST: **Entry of Residence to Arrest; "Currently Present" at the Dwelling**

Gutierrez v. State, CACR 12-177, 2012 Ark. App. 628, 11/7/12

Elfido Gutierrez was arrested on October 14, 2010, when federal agents were attempting to execute an arrest warrant for his nephew, Alonzo Gutierrez, at a residence in Vilonia.

At the suppression hearing, Special Agent Jon Vannatta of the Drug Enforcement Administration (DEA) testified that he was tasked with finding Alonzo. The State introduced an arrest warrant for Alonzo dated October 8, 2010, which had been issued by the United States District Court for the Eastern District of Arkansas. During the course of a long-term investigation, Alonzo had been observed at 83 Hollands Hill Loop in Vilonia on numerous occasions, including following narcotics transactions. Agent Vannatta stated that on October 13, 2010, Alonzo was observed in the front yard at the residence, where agents believed he was staying, and his truck was parked there. At around 6:00 a.m. on October 14, 2010, officers initiated ground and aerial surveillance to determine whether anyone was at the residence. Agent Vannatta testified that the officers' goal was to allow people to leave the residence and to then conduct traffic stops to make it safe to take Alonzo into custody.

He stated that at around 6:20 a.m., a vehicle was observed traveling behind the house in the woods. At around 7:00 a.m., according to Agent Vannatta, he went to do ground

reconnaissance to see if he could locate the vehicle or any people at the residence. He did not see any vehicles at or around the residence. He did, however, notice that windows were open upstairs and one window in the back of the residence was broken; there was glass on the ground both inside and outside. Agent Vannatta testified that he thought there could be a kidnapping because of the possible break in. In the past, he had encountered cases where people had attempted to break into rural stash houses, kidnapped the occupants, and tortured them. He testified that they thought Alonzo "might" still "possibly" be there, they knew that the residence was a stash house for crystal methamphetamine, and crystal methamphetamine organizations are usually more violent and paranoid than other organizations.

According to Agent Vannatta, they decided to go in the house to look for Alonzo and make sure there was no "foul play." Agent Vannatta entered through the broken window. The officers announced themselves in both English and Spanish, and they heard movement upstairs. Agent Vannatta stated that he secured the ground floor of the residence and then went to secure the stairwell at the far end of the house. At that point, he heard what sounded like a round being chambered into a pistol; he alerted the rest of the team and yelled "police" and "come out." A woman appeared at the top of the stairs and indicated that there was another person upstairs. Agent Vannatta and Agent Juan Storey encountered Gutierrez and took him into custody. They continued with their security sweep of the house. They did not find Alonzo or anyone else; they did find, in plain view, controlled substances and drug paraphernalia. Agent Storey advised Gutierrez of his Miranda rights in Spanish. Agent Vannatta testified that agents recovered $850 in currency on Gutierrez, a plastic baggy containing a white powdery substance in Gutierrez's front pocket, aluminum foil with suspected crystal methamphetamine in his other pants pocket, and numerous firearms in the bedroom that Gutierrez occupied.

Elfido Gutierrez appealed to the Arkansas Court of Appeals arguing that the circuit court erred in denying his motion to suppress because law enforcement officers lacked the authority to enter the residence where he and the evidence were located. The Arkansas Court of Appeals found merit in his arguments and reversed and remanded, finding in part as follows:

"In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Under *Payton*, officers executing an arrest warrant at a residence must have (1) a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe the suspect is present. The officers' assessment need not in fact be correct; rather, they need only 'reasonably believe' that the suspect resides at the dwelling to be searched and is currently present at the dwelling.

"We turn to the issue of whether the officers had a reasonable belief that Alonzo was present when they entered the house. Our supreme court has held that officers reasonably believed that a defendant was

present at his residence at the time they went to execute the warrant because his car was parked there. *Benavidez v. State*, 352 Ark. 374, 101 S.W.3d 242 (2003). Here, Alonzo's vehicle was not present; that fact, while not determinative, is important in assessing the reasonableness of the officers' belief that Alonzo was home. The State argues that it was reasonable for agents to believe that Alonzo was present when they executed the warrant because it was in the early morning, a time when the residents of a house are most likely to be there, and because they had seen him standing outside the house the day before.

"There must be some reasonable basis for officers to believe a suspect is present in order to enter a residence to execute an arrest warrant. Here, there was no vehicle present or any other reason to believe that Alonzo was there when agents made the decision to enter the house. Alonzo had been seen there the day before, but at that time his vehicle was there—making it even less likely that he was home the following day when his vehicle was not. Furthermore, Agent Vannatta admitted at the suppression hearing that he did not want to be 'sitting out there all day waiting to see if anything was going to happen,' so he made the decision to go into the house. Under the particular facts of this case, we hold that the circuit court's denial of Gutierrez's motion to suppress based on the existence of the arrest warrant was clearly erroneous.

"Our supreme court has explained that warrantless searches in private homes are presumptively unreasonable, and the burden is on the State to prove that the warrantless activity was reasonable. An exception to the warrant requirement, however, occurs where, at the time of entry, there exists probable cause and exigent circumstances. Probable cause is determined by applying a totality-of-the-circumstances test and exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect.

"The State contends that the officers in this case had an objectively reasonable basis for believing that people were in imminent danger and their entry into the residence was proper. We note that at the time agents entered the house, they had been conducting surveillance for over an hour. They neither saw nor heard the window break, nor was there any movement from within the house. Agent Vannatta testified to the violent nature of methamphetamine organizations and stated that he had seen instances where kidnapped individuals were being tortured, but there was no basis for believing that a kidnapping was underway that morning. This is exactly the type of 'potential or speculative harm' that this court has rejected as exceeding the scope of the imminent danger exception. We hold that the trial court clearly erred when it denied Gutierrez's motion to suppress based on exigent circumstances."

CIVIL LIABILITY:

Canine; Excessive Force

Campbell v. City of Springboro, Ohio
CA6, No. 11-3589, 11/29/12

Samuel Campbell and Chelsie Gemperline were attacked on different dates by a canine unit police dog (Spike). They sued an Ohio police officer, police chief, and their municipality, alleging that the peace officer used excessive force by allowing his canine officer, Spike, to bite them. They also alleged that the police chief failed to supervise the department's canine unit and failed to permit routine maintenance training for the canine officers.

In each case, Spike bit the plaintiffs without receiving his handler's command to do so. In the first case, plaintiff Samuel Campbell was found lying on the ground in the back yard of a home when Spike bit him. The police were at the home because they received a noise complaint, and Campbell alleged that Spike's handler made eye contact with him before Spike bit him. In the second case, police were called to a home to investigate underage drinking and arrested plaintiff Chelsie Gemperline. After being cuffed and placed in the police cruiser, Gemperline managed to wriggle one hand out of the cuffs, crawl out the cruiser window, and run into a neighbor's backyard. Officers began looking for Gemperline with Spike. Spike found her in a child's playhouse and bit her. Spike's handler had to remove the dog from Gemperline's leg.

The district court denied the defendants' motion for summary judgment, and the Sixth Circuit affirmed. Prior to both bite incidents, the handler notified supervisors that he had been unable to keep up with maintenance training and repeatedly requested that they allow him time to attend training sessions, but his requests were denied. Spike's state certifications lapsed for several months. There was evidence that Spike was involved in biting incidents with growing frequency in the first three years of his deployment in the field. The Court also stated that a jury could also "reasonably conclude that the handler acted in a wanton or reckless manner, based on the plaintiffs' allegations."

CIVIL LIABILITY:

Citizen has No Obligation to Answer Question During a Consensual Encounter

Kaufman v. Higgs, CA10, No. 11-1390, 10/23/12

On March 14, 2009, a tan Infinity hit an unoccupied car in a jewelry store parking lot. The Infinity was driven by a female and carried a male passenger. The driver inspected the car she had hit, conversed with her male passenger, and then drove away without leaving any information.

Someone witnessed the incident, took down the Infinity's license plate number, and reported these observations to the Colorado State Patrol. Troopers Jonathan Higgs and Richard Milner investigated the report. They began by running a search on the license plate number of the Infinity and determined that it belonged to Mr. Richard Kaufman. The troopers also checked the jewelry store's receipt records and found that Mr. Kaufman had made a purchase in the store a few minutes before the accident. Trooper Higgs tried to get in touch with Mr. Kaufman over the next couple of weeks. Eventually Trooper Higgs reached Mr. Kaufman by telephone.

Trooper Higgs informed Mr. Kaufman about his investigation into the accident, and Mr. Kaufman agreed to allow Troopers Higgs and Milner to speak with him at his residence later that day.

At the meeting, Mr. Kaufman asked the troopers to reveal what they had learned during their investigation. The troopers declined to do so, but did tell Mr. Kaufman the name of the owner of the damaged car. Within the troopers' hearing, Mr. Kaufman called the victim and offered to pay for the damage incurred by the victim. The troopers then continued to question Mr. Kaufman. They asked him who was driving his vehicle on the day of the accident. Mr. Kaufman cited "privilege" and declined to identify the driver of his vehicle.

Frustrated by Mr. Kaufman's silence, Trooper Milner contacted his supervisor, Corporal Scott Liska, updating him on the interview. Corporal Liska advised Trooper Milner that Mr. Kaufman could be arrested for obstruction of justice if he continued to refuse to identify the driver of his vehicle. Trooper Milner then presented Mr. Kaufman with two choices: reveal the driver's identity or be arrested for obstruction of justice. Mr. Kaufman declined to reveal the driver's identity and was arrested and taken to jail. Mr. Kaufman was issued a summons and complaint asserting that he had violated Colorado Revised Statutes § 18-8-104(1), Colorado's obstruction of justice statute. The charges against Mr. Kaufman were eventually dropped by the local district attorney's office.

Mr. Kaufman then filed this suit pursuant to 42 U.S.C. § 1983. Mr. Kaufman's complaint alleged violations of his Fourth and Fifth Amendment rights. The defendants moved for summary judgment on the ground of qualified immunity. In opposition to the summary judgment motion, Mr. Kaufman presented two theories of his case. First, he argued that he was subject to a false arrest in violation of his Fourth Amendment rights because Colorado's obstruction statute did not criminalize a refusal to answer police questions during a consensual encounter. Second, he argued that the defendants infringed his Fifth Amendment rights by retaliating against him for asserting his Fifth Amendment privilege.

The district court granted the defendants' motion for summary judgment. As to the Fourth Amendment claim, the court concluded that there was no false arrest because the troopers had probable cause to believe Mr. Kaufman's silence, accompanied by assertion of privilege, constituted a violation of the obstruction statute. He pursues his argument that his Fourth Amendment rights were violated when he was arrested without probable cause. For their part, the defendants have never argued that their seizure of Mr. Kaufman was justified by suspicion about Mr. Kaufman's involvement with the hit-and-run accident; throughout this litigation, they have relied *only* on the theory that they could reasonably have believed that Mr. Kaufman's refusal to answer their questions during a consensual encounter constituted probable cause for his arrest for obstruction of justice.

The Tenth Circuit disagreed and reversed. The defendants never contended that their encounter with Mr. Kaufman was other than consensual; the law was well established

that a citizen has no obligation to answer an officer's questions during a consensual encounter; and the Colorado Supreme Court had made it clear that the Colorado obstruction statute is not violated by mere verbal opposition to an officer's questioning. It follows that the defendants could not have reasonably thought that they were justified in arresting Mr. Kaufman and their motion for summary judgment on the ground of qualified immunity should have been denied.

CIVIL LIABILITY:
Civil Repossession; State Involvement

Hensley v. Gassman, CA6, No. 11-1071, 9/11/1

On August 13, 2008, at approximately 3:15 a.m., Ronald Gassman, who repossessed collateral for lenders in the Ogemaw County, Michigan area, went to the Hensley residence in Prescott, Michigan, to repossess a four-door Buick. McClellan Hensley, Sr. (Hensley Sr.), owned the Buick, but his wife, Sheila Hensley, drove it. After observing the Buick in the driveway at the Hensley residence, Gassman and his helper, Christian Wottrich, drove down the road and called the sheriff's department to request police presence, also known as a "civil stand-by," during the repossession. Gassman requested police assistance because Hensley Sr.'s conduct during a previous repossession resulted in an assault charge against Hensley Sr., and Gassman was concerned about potential violence.

Deputies Scott and Gilbert were dispatched to assist Gassman. The Deputies met Gassman and followed him to the Hensley residence. When they arrived, the Deputies pulled their patrol car onto the Hensleys' property, and Gassman backed his tow truck into the driveway toward the Buick, which was parked facing the house. At some point, apparently after they arrived, Gassman told the Deputies that he had a repossession order and showed them a file containing some documents. The Deputies did not read the documents.

At the time, Hensley Sr. was away at work, but Sheila and their adult son, McClellan Hensley, Jr., were at home sleeping. As the Deputies walked toward the Buick, Sheila and Hensley Jr. woke up and went to the door. Sheila and Hensley Jr. stepped outside onto the porch and began telling Gassman and the Deputies that they should not take the Buick. Hensley Jr. stood between the Buick and the tow truck to prevent Gassman from hooking up the Buick. Hensley Jr. shouted at Deputy Gilbert, who was standing nearby, as well as Gassman and Wottrich, telling them that they could not take the vehicle and had to leave the property. Deputy Gilbert responded that they were not going to leave and that Gassman was taking the Buick. Deputy Scott ordered Hensley Jr. to step out of the way. Hensley Jr. moved to the side of the Buick after Gassman bumped him with the tow truck while backing up to the Buick.

While Hensley Jr. was shouting at Deputy Gilbert, Sheila explained to Deputy Scott that her payments were up to date and the car was not supposed to be repossessed. Deputy Scott responded that he did not care and, if that were the case, she could take her paperwork to Gassman or Burns Recovery (Gassman's client) in the morning to sort things out. In spite of Sheila's protest, Deputy Scott said that Gassman still had to take the Buick. In response, Sheila got into the Buick, started it,

and locked the doors. She then lowered her window and shouted for Hensley Jr. to get her cell phone from the house. Hensley Jr. retrieved the phone and handed it to Sheila as she put the window down. By this time, Gassman and Wottrich were out of their truck and lying on the ground attempting to hook chains to the Buick's rear axle. At some point, Deputy Scott went to the Buick's driver-side window and ordered Sheila to exit the vehicle. She did not comply. Deputy Scott continued to shout at Sheila and threatened to break the window because Sheila had put the car in drive and was pulling the tow truck, which by then was chained to the car, toward Gassman and Wottrich as they were on the ground next to the rear wheels of the Buick. When Sheila still refused to get out, Deputy Scott unsuccessfully tried to break the car window with the butt of his handgun.

After Gassman hooked up the Buick and with Sheila still inside, Deputy Scott told Gassman to pull it out of the driveway and into the road. Once the Buick was parked on the road, Deputy Scott ordered Sheila several times to exit the vehicle, but she did not comply. Deputy Scott then used a hammer to break the passenger-side window, reached inside, and unlocked the doors. Deputy Gilbert then opened the driver-side door and pulled Sheila from the car. Deputy Scott opened the passenger-side car door, began moving items from the back to the front seat of the car, and told Sheila that if she wanted anything from the car, she should "get it out now." After Sheila and Hensley Jr. retrieved Sheila's personal belongings, Gassman re-hooked the Buick and towed it away.

Lo and behold, later that morning Gassman discovered that Sheila was indeed telling the truth about the payment. He had another tow truck driver return the Buick to the Hensleys.

The Deputies did not arrest Sheila that morning, nor, apparently, did they even mention that she had committed a crime. About a week later, however, on August 21, 2008, they submitted a warrant request to the prosecutor seeking felonious assault charges. On August 28, 2008, a judge signed a felony warrant charging Sheila with two counts of assault with a dangerous weapon in violation of M.C.L. § 750.82, based on her pulling the tow truck toward Gassman and Wottrich while they were on the ground. Following a preliminary examination, Sheila was bound over on two counts of felonious assault and a charge of reckless driving. On May 19, 2010, Sheila pled no contest to both counts of felonious assault and to a misdemeanor charge of attempted aggravated assault.

Sheila pled no contest to felonious assault and to misdemeanor attempted aggravated assault, then filed suit under 42 U.S.C. 1983. The district court rejected Fourth Amendment claims, based on qualified immunity, and dismissed conspiracy and state-law claims. The Sixth Circuit reversed, finding in part as follows:

"The Hensley's claim that the Deputies' participation in Gassman's repossession violated the Fourth Amendment by transforming the repossession into an unreasonable seizure. The Fourth Amendment's prohibition of unreasonable seizures extends to seizures of property regardless of whether the possessor has a privacy interest in the property. A constitutional violation occurs only where the seizure is objectively unreasonable, *United*

States v. Place, 462 U.S. 696, 701 (1983), a determination that entails a 'careful balancing of governmental and private interests.'

"Gassman sought to repossess the Hensleys' Buick pursuant to Michigan's version of the Uniform Commercial Code which authorizes a creditor to use self-help, i.e., without a court order, to repossess collateral if it can be accomplished without breaching the peace. A self-help repossession is a civil matter generally considered to be a 'purely private action.' *United States v. Coleman*, 628 F.2d 961, 963 (6th Cir. 1980).

"In cases such as this, where the plaintiff seeks to hold government actors liable for participation in a repossession, state action is usually the central issue. Governmental actors such as the Deputies *normally can be held responsible for a private decision only when they have exercised coercive power or have provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.*

"We note that a police officer's presence during a repossession solely to keep the peace, i.e., to prevent a violent confrontation between the debtor and the creditor, is alone insufficient to convert the repossession into state action. This holds true even where the officer interacts with the parties in the performance of official police functions. At some point, as police involvement becomes increasingly important, repossession by private individuals assumes the character of state action.

"Even without active participation, courts have found that an officer's conduct can facilitate a repossession if it chills the plaintiff's right to object. As numerous state court cases and secondary authorities have recognized, an objection, particularly when it is accompanied by physical obstruction, is the debtor's most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring the creditor to abandon his efforts to repossess. A police officer's arrival and close association with the creditor during the repossession may signal to the debtor that the weight of the state is behind the repossession and that the debtor should not interfere by objecting.

"Perhaps the most helpful case is *Barrett v. Harwood,* 189 F.3d 297 (2d Cir. 1999), in which the Second Circuit described the cases as falling along a spectrum of police involvement. A minim police involvement not constituting state action is at one end of the spectrum. As an example, the *Barrett* court cited *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980), in which this court held that officers who were parked down the street and around the corner from the debtor's residence and never left their cruiser during the repossession neither encouraged nor directed the repossession and were not indispensable to its success. Further along the spectrum, the *Barrett* court observed, are cases such as *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), involving more than police presence that does not amount to state action. In *Menchaca,* the officers arrived on the scene in the middle of the repossession, told the debtor that he could be arrested if he continued to use loud, abusive language, and departed after the situation calmed down but

before the repossession was completed. The Fifth Circuit held that this activity was not intervention or aid in the repossession. Finally, the *Barrett* court observed that cases finding state action, or at least a jury issue, comprise the other end of the spectrum. Among other cases, the *Barrett* court cited *Soldal v. County of Cook*, 942 F.2d 1073 (7th Cir. 1991). In *Soldal*, at the request of the trailer park owner, a deputy sheriff arrived at the plaintiff's mobile home with two trailer park employees and told the plaintiff that he was there to ensure that the plaintiff did not interfere with the eviction, which was illegal because no court order had issued. The court found the deputies' actions sufficient for state action because they prevented the plaintiff from exercising his right to resist.

"In the instant case, the Deputies' actions between the time of their arrival and the time Sheila got into the Buick were more than mere police presence and reflect circumstances other courts have found indicative of state action: (1) the Deputies arrived at the Hensley residence with, and at the request of, Gassman; (2) Deputy Scott ordered Hensley Jr., at least once, to move from between the Buick and the tow truck, as Hensley Jr. was attempting to thwart the repossession; (3) the Deputies ignored Hensley Jr.'s demands to leave the property; (4) Deputy Gilbert told Hensley Jr. that Gassman was taking the Buick; and (5) Deputy Scott ignored both Sheila's protest and her explanation and told Sheila that Gassman was still going to take the Buick. The circumstances of this case are somewhat unique because, rather than dissuading Sheila from objecting, the Deputies' conduct prompted her to do so. We need not dwell on these facts, however, because the Deputies concede that Deputy Scott's act of ordering Gassman to tow the Buick to the road, which the Deputies claim was necessary to resolve the situation, was state action. More importantly, although the Deputies do not expressly concede the point, it cannot be reasonably disputed that their conduct of breaking the car window, removing Sheila, and ordering her to remove her belongings from the car was state action. Equally clear is that this conduct was not only active participation, but was instrumental to Gassman's success in completing the repossession. Sheila asserted her right to object not only through words, but by physically taking control of the Buick. At that point, Gassman's right to pursue his self-help remedy terminated, and he was required to cease the repossession. Regardless, the Deputies' subsequent actions, which enabled Gassman to seize the Buick, resolved the stalemate in favor of Gassman—the party neither factually nor legally entitled to the Buick.

"We are thus left with the question of whether the seizure was unreasonable. The Deputies knew that: (1) the repossession was a private civil matter; (2) Gassman claimed that he was authorized to repossess the Buick; (3) Sheila disputed Gassman's authority to take the Buick and gave a specific reason why the repossession should not occur; and (4) the Deputies lacked any evidence substantiating Gassman's claim of authority to repossess the Buick. Given these undisputed facts, a reasonable trier of fact could certainly conclude that the seizure was unreasonable."

CIVIL LIABILITY: **Extradition**

Slater v. Clarke, CA9, No. 11-35699, 11/19/12

Daniel Tavares was released from prison by the Massachusetts Department of Corrections in June 2007 after serving over fifteen years in prison for murdering his mother. While in prison, Tavares joined a white supremacist gang, assaulted and threatened staff and inmates, and made threats against the life of then-Governor Mitt Romney and then-Attorney General Thomas Reilly. Just prior to his release date, he was arraigned for two incidents involving violent assaults on prison staff. Tavares was subsequently released on his own recognizance. He did not appear for a hearing on the new charges and two warrants for his arrest were issued.

Tavares had traveled to Washington State. Officials from Massachusetts contacted their law enforcement counterparts in Washington and asked them to locate Tavares. The defendant officials, including Erin Donnelly, a Worcester County Assistant District Attorney; Sergeant Richard Range, an employee of the Massachusetts Commonwealth Fusion Center; and Kevin Burke, then Secretary of the Executive Office of Public Safety and Security, knew about Tavares' violent history, his pending criminal charges, and his whereabouts in Washington. The complaint alleges that, after Tavares was found, Donnelly, Range, and Burke decided to request a limited extradition warrant that authorized extradition only from New England states, not from Washington, where they knew Tavares to be located.

In November 2007, Tavares murdered Beverly and Brian Mauck in their home in Washington State. The parents and personal representatives of the victims brought suit against several Massachusetts officials allegedly responsible for not extraditing Tavares in the months prior to the murders. The complaint seeks damages and injunctive and declaratory relief. It alleges that the defendants violated the victims' civil rights under 42 U.S.C. §§ 1983 and 1985, and committed acts amounting to negligence and gross negligence. The defendants filed motions to dismiss on the basis of absolute immunity, which the district court denied. Burke, Range, and Donnelly now appeal the denial of their motions to dismiss.

The Court of Appeals for the Ninth Circuit stated that this case requires that they consider whether state officials are absolutely immune from civil liability for the decision not to extradite or to request only limited extradition. Because the decision whether or not to extradite a criminal defendant is intimately associated with the criminal phase of the judicial process, government officials are absolutely immune from suits arising out of their performance of this function.

CIVIL LIABILITY: **False Statements in Affidavit**

Betker v. Gomez, CA7, No. 11-3009, 9/5/12

Richard Betker was shot twice during a late-night police raid on his home. The officer who shot him was part of a tactical unit executing a no-knock search warrant secured by Officer Rodolfo Gomez, who obtained the warrant after receiving information from Debbie Capol,

the estranged sister of Betker's wife, Sharon, regarding Sharon being a convicted felon allegedly in possession of a firearm. Capol now swears that most of the information that Gomez related in his affidavit to support the warrant's issuance was not true.

In Betker's suit under 42 U.S.C. 1983, the district court denied Gomez's motion for judgment based on qualified immunity. The Seventh Circuit affirmed, noting that Betker has produced sworn deposition testimony of Capol contradicting the probable cause affidavit. If believed, that testimony would establish that Gomez knowingly or with reckless disregard for the truth made false or misleading statements in the affidavit. Absent those false statements, probable cause for the no-knock warrant would not have existed.

CIVIL LIABILITY: **Jails and Prisons; Health and Safety**

Gruenberg v. Genpeler
CA7, No. 10-3391, 9/26/12

Darrin Gruenberg, who has accrued 230 misconduct reports since his incarceration for burglary in 1999, seized a set of keys from a prison guard and swallowed them. He was taken to a hospital, where an x-ray showed that the keys were lodged in his abdomen. A physician told the prison officials that Gruenberg would probably pass the keys naturally within five days. They returned him to the prison and kept Gruenberg naked and in restraints for five days until he passed the keys. After five days, Gruenberg had not yet passed them and an endoscopy and colonscopy was needed to remove them. Gruenberg sued, claiming violation of his Eighth Amendment right to be free from cruel and unusual punishment. The district court granted summary judgment in favor of the defendants. The Seventh Circuit affirmed, citing qualified immunity. While the conditions were undoubtedly uncomfortable, there was no evidence that any member of the prison staff showed "deliberate indifference" to Gruenberg's health or safety. Those conditions were a reasonable response to a "unique situation."

CIVIL LIABILITY: **Non-Aggressive Questioning of Police Officers**

Patrizi v. Huff, CA6, No. 11-5963, 8/30/12

Judi Patrizi, an attorney, was at Bounce nightclub in Cleveland with her friend Molly Baron, Baron's brother, and his girlfriend, Brandi Mills. Officers Scott Huff and Thomas Connole arrived in the early morning hours in response to a reported assault. They met the victim reporting the incident, Wallace and she led them inside the nightclub to identify perpetrators. The officers escorted the group, which included Mills, toward the exit. Patrizi joined the group. Connole began to question Mills and Patrizi interjected; eventually, Patrizi was handcuffed and placed under arrest. The parties dispute the interactions leading to the arrest for obstructing official business.

In Patrizi's suit under 42 U.S.C. 1983, the district court denied the officers' motion to dismiss based on qualified immunity. The Sixth Circuit affirmed. The U.S. Supreme Court has clearly established that non-aggressive questioning of police officers is constitutionally protected conduct. When the

facts are viewed in her favor, Patrizi's actions fall within the protected ambit because her conduct did not cross the line into fighting words or disorderly conduct prohibiting the officers from conducting their investigation.

CIVIL LIABILITY: **Second Amendment**

Embody v. Ward, CA6, No. 11-5963, 8/30/12

Tennessee law allows individuals with gun permits to carry handguns in public places owned or operated by the state (Tenn. Code 39-17-1311(b)(1)(H)) and defines a "handgun" as "any firearm with a barrel length of less than twelve inches" designed or adapted to be fired with one hand.

Armed with knowledge of this law and one thing more—a Draco AK-47 pistol—Leonard Embody went to Radnor Lake State Natural Area, a state park near Nashville, Tennessee, on a Sunday afternoon. Dressed in camouflage, he slung the gun with its eleven-and-a-half-inch barrel across his chest along with a fully loaded, thirty round clip attached to it.

Embody anticipated his appearance at the park would attract attention—he carried an audio-recording device with him—and it did. One passer-by spontaneously held up his hands when he encountered Embody. Two park visitors reported to a park ranger that they were "very concerned" about Embody and the AK-47. R.22-3 at 5. And an elderly couple reported to a ranger that a man was in the park with an "assault rifle."

With assistance from police, a park ranger disarmed Embody at gunpoint to determine whether the AK-47 qualified under the law, releasing him about two-and-one-half hours later, after determining it was.

Embody sued, claiming violations of Second, Fourth and Fourteenth Amendment rights. The district court granted defendant summary judgment. The Sixth Circuit affirmed, finding in part as follows:

"The scope of the investigation was reasonably related to the circumstances that justified the stop. To the extent Embody argues that the Second Amendment prevents Tennessee from prohibiting certain firearms in state parks, qualified immunity applies. No court has held that the Second Amendment encompasses a right to bear arms within state parks."

CIVIL LIABILITY: **Use of Force; Taser Causing Death**

Marquez v. City of Phoenix
CA9, No. 10-17156, 9/11/12

Early in the morning of July 28, 2007, Lydia Marquez was roused from her sleep by the sounds of "yelling…and cussing" coming from a spare bedroom in her Phoenix, Arizona, home. Inside were her son Ronald, her granddaughter Cynthia, and her great-granddaughter Destiny. A few days earlier, Cynthia had suffered a head injury in a car accident, causing her to make odd statements about her relationships with God and the devil. Concerned about what was happening, Lydia knocked on the bedroom door. When the screaming stopped, she returned to sleep. Shortly thereafter, Lydia awoke again to sounds of "praying and yelling." Sensing that there was "something

wrong, something bad going on," Lydia went to the nearby home of a relative and called the police.

Officer Joshua Roper was the first to arrive. He began to gather details from members of the Marquez family while he waited outside the home for Officer David Guliano, who was en route. The officers learned that Ronald was attempting to perform an exorcism on three-year-old Destiny, but that (so far as his relatives knew) he had no weapons. The officers radioed for instructions, but after they heard a little girl screaming and crying like she was in severe pain or "something was torturing her," they decided they could not wait. With Lydia's assistance, the officers entered the house and proceeded to the bedroom door. The screaming continued. Officer Roper drew his TASER X26 ECD ("X26"), an electronic control device manufactured by TASER International, Inc. Officer Guliano drew his service pistol. At the door, they identified themselves as police officers. The shouting intensified until the officers could no longer hear Destiny. Concerned for the child's safety, the officers decided to enter the bedroom but were unable to open the door because a bed had been shoved in front of the aperture. Using their combined body weight, the men were eventually able to force the door partially open at an angle. Roper, who was taller, clambered into the room through this gap.

He was greeted by chaos. The relatively small bedroom was cluttered with two beds, a dresser, and a large TV stand. The walls and furniture were smeared with blood. A malfunctioning air conditioning unit left the room sweltering. Shirtless, the heavy-set Ronald reclined on the larger bed with the now silent and motionless Destiny in a choke-hold, his hands hidden. Cynthia—who at 19 was quite a large woman—was naked in the corner screaming. Her face showed evidence of a recent beating. It was later discovered that Ronald had gouged her eye in an attempt to exorcize her demons.

Officer Roper ordered Ronald to "let go of the child or I'm going to tase you." When Ronald did not comply, Roper deployed the X26 in "probe mode." Two darts shot from the front of the X26 and lodged in Ronald's left side. If it had performed as intended, the X26 would have incapacitated Ronald by overriding his central nervous system through a series of electrical pulses. But the X26 functions properly in this mode only if the darts are separated by at least four inches. This would have required Roper to have been standing at least seven feet from Ronald, but the cramped conditions in the bedroom made that impossible. As a result, the X26 did not appear to affect Ronald as intended. Nevertheless, Roper pulled the trigger a second time. When this discharge also appeared not to work, Roper removed the cartridge and tested the X26 to see if it was functioning. While he was doing so, Officer Guliano—who had not yet been able fully to enter the room—extracted Destiny through the partially open door. He passed her into the arms of a waiting relative before joining Officer Roper inside the bedroom.

At this point, Ronald kicked Roper in the thighs and groin. Roper decided to apply the X26 in "drive-stun mode." Deployed thus, a user removes the cartridge from the X26 and places the weapon's exposed electrodes in direct contact with the skin. "Drive-stun mode" does not incapacitate the target, but

instead encourages the suspect to comply by causing pain.

Over the next three minutes, Officers Roper and Guliano each tried to use Roper's X26 in this mode, but Ronald was flailing so wildly that they were never sure that they made good contact.
They testified that most of the charge either went into the air or into the officers themselves as they passed the single-X26 to each other. Even when they did make contact, the weapon seemed to have no effect on Ronald.

After the officers finally wrestled Ronald into submission, they turned to Cynthia, who was by then trying to assault Roper. It took two or three minutes and two deployments of the X26 to subdue her. When officers returned their attention to Ronald, they found that he had a weak pulse. Despite resuscitation efforts, Ronald went into cardiac arrest and died.

Dr. Kevin Horn performed the autopsy. Unlike in many cases of in-custody deaths, the only evidence of controlled substances in Ronald's system was marijuana metabolites. Dr. Horn did, however, discover that Ronald suffered from heart disease. Ronald's body also showed signs of a struggle with "multiple, incidental" "contusions and abrasions." He had seven sets of burns consistent with "drive-stuns" from an X26 and two probes embedded in his lower left chest. Dr. Horn listed the cause of death as "excited delirium." He listed "hypertensive atherosclerotic cardiovascular disease" as a contributing condition, but made no mention of the X26 in a similar role.

Subsequent investigation demonstrated that the officers pulled the X26's trigger a combined 22 times, but the discharges were not the uniform five-second cycle associated with the weapon. It is unclear how long the X26 was in contact with Ronald while discharging.

In this case, the Court of Appeals for the Ninth Circuit considered whether a police officer used constitutionally excessive force by repeatedly deploying an electronic control device—commonly known as a "taser"—against a combative suspect. They found, in part, as follows:

"We balance Ronald's Fourth Amendment interests against the governmental interests at stake. Key to this inquiry are the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting or attempting to evade arrest by flight. But this list is not comprehensive. Instead, we examine the totality of the circumstances, including whatever factors may be relevant in a particular case. For example, we have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force.

"Here the relevant factors favor a finding that this use of force was reasonable. Once Roper and Guliano traversed Ronald's barricade, they were greeted by a blood-spattered room, an injured adult, and a child in evident distress. This alone was cause to believe that

at least one serious crime had occurred. As a result, this case is easily distinguished from the only instance in which we have found the use of an electronic control device to be unreasonable—where officers deployed the device in 'probe mode' against two unarmed women, who had committed (at most) minor infractions and who were not actively resisting arrest. *Mattos*, 661 F.3d at 445. It also renders inapposite those cases in which police are summoned to protect mentally disturbed individuals from themselves.

"Ronald—who was warned that he would be 'tased' if he did not comply—was also actively resisting arrest. Though the Marquezes allege that any apparent resistance was, in fact, involuntary muscle spasms caused by the X26, they have offered no proof. By contrast, Officers Roper and Guliano have consistently testified that Ronald was actively struggling, pushing his knees into his body so that he could use his feet both to lever himself off the bed and to kick the officers. For example, he kicked Roper in the groin after he removed the cartridge and before Roper began redeploying it (when, under the Marquezes' own theory, there should have been no X26-induced movement). Nothing 'in the record, such as medical reports, contemporaneous statements by the officer or the available physical evidence,' undermines the officers' credibility. Indeed, the autopsy—the only available medical evidence—shows numerous incidental contusions and is consistent with a prolonged struggle. In light of this evidence, the Marquezes may not rely on mere allegations to defeat summary judgment.

"For similar reasons, the officers could reasonably have thought that Ronald posed an immediate risk to Cynthia. We have repeatedly observed that the volatility of situations involving domestic violence makes them particularly dangerous. While Ronald was clearly not hitting Cynthia while he was choking Destiny, the Marquezes do not explain why the officers could not reasonably have thought that she would be his next target if they left given her visible injuries and the amount of blood in the room.

"Furthermore, the officers could reasonably have believed that they were themselves in danger. Officers are well aware that more of their colleagues are injured on domestic violence calls than on any other sort. As a result, when officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Roper has consistently stated that Ronald began assaulting him as soon as Guliano had removed Destiny (that is, before Guliano himself entered the room). And the Marquezes' suggestion that Roper simply disengage and leave is unrealistic. Roper would have had to expose himself to further injury as he tried to squeeze his body through a partially open door that was angled into the room. Officers would then have had to force their way back into the room to arrest Ronald or to help Cynthia if she needed it."

In summary, although the officers used significant force in this case, it was justified by the considerable government interests at stake.

DWI: **Probable Cause to Arrest; Observation of Police Officer**

Foster v. State, No. CACR 12-428, 2012 Ark. App. 640, 11/7/12

In *Foster v. State,* No. CACR 12-428, 2012 Ark. App. 640, 11/7/12, Lisa Foster argues that the evidence was insufficient to prove that she was driving while intoxicated. She notes that her blood-alcohol content, as measured by the breath test, was less than the presumptive illegal amount provided by Arkansas Code Annotated section 5-65-103(b) (Repl. 2005); there was evidence that she was distraught; and she was wearing flip-flops on uneven ground, which could have contributed to her unsteadiness on her feet. Thus, Foster urges, the evidence was insufficient to compel a conclusion beyond suspicion and conjecture.

The Arkansas Court of Appeals found no merit to Foster's argument, finding in part as follows:

"Proof of blood-alcohol content is not necessary to sustain a DWI conviction. Such proof, however, is admissible as evidence tending to prove intoxication. The observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. Moreover, variances and discrepancies in the proof go to the weight or credibility of the evidence, and it is for the fact-finder to resolve any conflicts and inconsistencies. Finally, the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings.

"In the instant case, the circuit court made a specific finding that Corporal Charles Lewis of the Arkansas State Police was more credible than Foster. Foster's various explanations and changing testimony (on direct examination, she said she had 'a couple of beers,' but on cross, she said she only had one) likely diminished her credibility in the eyes of the judge, who was, of course, not required to believe her. Lewis offered credible testimony that there was a noticeable odor of alcohol in the car, that Foster was so unsteady on her feet that he was afraid to conduct field-sobriety tests for fear of her falling, and that she told him that she had consumed two beers after taking medication. On this evidence, we cannot say that the circuit court had to resort to speculation and conjecture to conclude that Foster was guilty of driving while intoxicated."

MIRANDA: **Custody; Suspect's Belief There is Probable Cause to Arrest Him**

Thomas v. State, Maryland Court of Appeals, No. 130, 10/26/12

Konnyack Thomas, having been contacted by police, agreed to speak with the officers at the station. Prior to his arrival, he spoke with his estranged wife who informed Thomas that the police wanted to speak to him about accusations of sexual abuse made by their daughter against Thomas. When he arrived at the station, Thomas met with two detectives and spoke with them for approximately an hour and a half, during which he confessed to touching his daughter inappropriately and having intercourse with her. Thomas was arrested approximately twenty minutes after the

interview concluded and was charged in the Circuit Court for Montgomery County with one count of sexually abusing a minor, two counts of second degree rape, and six counts of second degree sexual offense. Prior to trial, Thomas filed a motion to suppress all of the statements he had made and argued that he had not been given *Miranda* warnings at the time he arrived at the police station, although he should have been. The circuit court judge agreed and suppressed the statements.

The Maryland Court of Special Appeals reversed, determining that Thomas was not in custody at the time he gave the statements at issue. Likewise, the Court of Appeals held that Thomas, who had driven himself to a police station after being asked to come by the police, was told he was not under arrest, and was questioned in an unlocked room, was not "in custody," so that *Miranda* warnings were not necessary and Thomas's confession was admissible at trial.

MIRANDA: **Public Safety Exception**

United States v. Ferguson
CA2, No. 11-3806-cr, 12/6/12

In this case, the Court of Appeals for the Second Circuit stated that this case requires us to determine whether the "public safety" exception to the requirement of Miranda warnings—an exception that the United States Supreme Court first recognized in New York v. Quarles, 467 U.S. 649, 655–56 (1984)—applies where police officers have reason to believe that a suspect may have left a gun in a public place, but where interrogation occurs an hour or more after the suspect's arrest.

On the evening of July 21, 2010, Lamont Ferguson had a verbal and physical altercation with two women. When Ferguson left the place where the altercation had begun, the two women followed him. After one woman threatened Ferguson with a bottle, he brandished a pistol and fired it into the air, hoping to scare the women away. At approximately 10:10 PM, someone called 911 and informed police officers that an individual named "Lamot" had fired two shots in the vicinity of West 228th Street in the Bronx, New York. During the 911 call, the operator learned that "Lamot" lived at 125 West 228th Street on the twelfth floor.

At approximately 11:00 PM, while Ferguson was standing in front of his apartment building on West 228th Street, two police officers approached him and asked him if his name was "Lamont." When he indicated that it was, the officers arrested him and took him to the 50th Police Precinct. At the precinct, Ferguson was questioned by Sergeant Ian Rule without previously being given *Miranda* warnings. After interrogation, Ferguson led officers to his sister's apartment—on the seventh floor of 125 West 228th Street—where they recovered a pistol. Upon returning to 50th Precinct, officers informed Ferguson, for the first time, of his *Miranda* rights under the Fifth Amendment. Ferguson then gave a written statement in which he admitted to possessing and firing the pistol that the officers had recovered.

Sergeant Rule testified that, on the evening of July 21, 2010, he was working in the 50th Precinct as a Field Intelligence Officer. According to Sergeant Rule, Field Intelligence Officers gather intelligence about criminal activity from arrestees, but generally do not

try to develop the evidence necessary to prosecute the arrestees whom they question. During his shift on July 21, 2010, Sergeant Rule read a transcription of the 911 call that reported that "Lamot" had fired two shots near West 228th Street. Several months earlier, Sergeant Rule had received information that an individual named Lamont, who lived at 125 West 228th Street on the twelfth floor, possessed and had access to firearms. After consulting an arresting officer, Sergeant Rule learned that officers had not recovered the weapon Ferguson reportedly had fired when they arrested him earlier on the evening of July 21 in connection with the 911 call.

Sergeant Rule testified that, based on reports of the arrest and the prior information he had received about Ferguson, he began to feel:

> *a sense of urgency because it became more clear to me that there was a firearm possibly out there that we did not—didn't know where it was and the location where this incident happened, 125 West 228, or right across the street from it, it's in very close proximity to a playground and ball fields and also there's a church across the street, so I felt that possibly the weapon could have been out there for anyone to get, to grab, maybe a child or some kid or something like that, so I wanted to make sure that we could try and find out where this gun was as soon as possible.*

Concerned with the recovery of the gun, Sergeant Rule began to interrogate Ferguson. Because Sergeant Rule "was trying to find out the location of the firearm," he did not inform Ferguson of his Fifth Amendment rights. Sergeant Rule testified that he felt that if he had given *Miranda* warnings, it might have scared Ferguson where he wouldn't tell him where the gun was. During the interrogation, Sergeant Rule explained to Ferguson that it is very important that if there was gun out there, that the officers were able to find it before someone else—before someone got hurt. While Sergeant Rule told Ferguson that "cooperation would always be looked at in his favor," he made no promises, instead clarifying that prosecutors would make "the ultimate decision." Sergeant Rule interrogated Ferguson for approximately thirty to forty-five minutes. Eventually, Ferguson agreed to accompany officers back to his apartment building. The officers left the 50th Precinct with Ferguson to recover the gun at around 1:00 AM on the morning of July 22, 2010. Ferguson led officers to his sister's apartment on the seventh floor, where they recovered the gun.

The Court stated that for the reasons set forth, principally that police officers had an immediate and objectively reasonable need to protect the public from a realistic threat, they held that the "public safety" exception applies, and thus they affirmed Ferguson's conviction.

MIRANDA: **Request for Counsel; Subsequent Interrogation**

United States v. Scott
CA6, No. 10-5811, 9/10/12

Anthony E. Scott was apprehended by Memphis, Tennessee, police on May 28, 2008, near the scene of the robbery of an auto parts store. The Memphis police had been investigating a string of robberies similar to the robbery at the auto parts store, and the police believed Scott might have been involved in both the string of robberies and

the May 28 robbery. The police took Scott to the Memphis Robbery Bureau, where Detective Tony Taylor read Scott his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and gave Scott an Advice of Rights form. The form included the following *Miranda* warning:

> *You have the right to remain silent. Anything you say can be used against you in a court of law. You have a right to have a lawyer, either of your own choice, or court appointed, if you are unable to afford one; and to talk to your lawyer before answering any questions; and to have him with you during questioning, if you wish.*

Below the warning, the form included two questions and spaces below the questions in which Scott wrote answers to the questions as follows:

> *Q: Do you understand each of these rights I've explained to you?*
> *A: Yes*
>
> *Q: Having these rights in mind, do you wish to talk to us now?*
> *A: No*

After Scott filled out this form, he said that he did not want to speak with the officers. The officers ceased questioning. Detective Eric Hutchison transported Scott from custody at the Robbery Bureau to Bartlett Jail. Scott testified that, a few minutes before Hutchison transported Scott, Hutchison said, "We're going to take you to another jail until you ready to say something, and we will come back and get you tomorrow and see if you ready then." Hutchison testified that while Scott was entering the transport vehicle, Scott said to Hutchison: "Hey, look, I know I need to talk to y'all, I just can't do it right now, let me get my head together, and I will talk to y'all later." Scott did not testify as to whether he made any statement to Hutchison during the period prior to his being transported or upon entering the vehicle.

The next evening, May 29, Scott was transported from Bartlett Jail back to the Robbery Bureau. Detectives at the Bureau began an interview with him, in which Scott was again presented with the Advice of Rights Form. This time, he answered "yes" to both questions. Scott then made statements to the police, confessing to various robberies, but not to the May 28 robbery. He was returned to Bartlett Jail. On his third day in custody, May 30, police again transported Scott from Bartlett Jail to the Robbery Bureau and presented him with the Advice of Rights Form; he again answered "yes" to both questions and he subsequently confessed to a number of robberies.

Before trial, Scott moved to suppress the confessions he made at the Robbery Bureau. The district court denied the motion. Scott was tried before a jury and convicted of sixteen counts of robbery, attempted robbery, and the use of a firearm in connection with the robberies and attempted robbery. Scott appeals his conviction, arguing that the district court erred in denying his motion to suppress his statements to the police at the Robbery Bureau.

The Court of Appeals for the Sixth Circuit found, in part, as follows:

"In *Edwards v. Arizona,* 451 U.S. 477 (1981), the Supreme Court held that law enforcement officers must 'immediately

cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation.' *Davis v.United States,* 512 U.S. 452, 454 (1994). The suspect must unambiguously request counsel. He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. *Berghuis v. Thompkins,* 130 S.Ct. 2250, (2010).

"At the suppression hearing, Scott testified that he invoked his right to counsel on May 28, 2008, the day of his arrest, by verbally stating to Detective Tony Taylor that he wanted a lawyer. Taylor testified at the suppression hearing that Scott never requested a lawyer. The district court found Taylor's testimony as to whether Scott verbally invoked his right to counsel credible. The district court found Scott's testimony on the subject non-credible, and ruled that Scott had not verbally requested a lawyer.

"Scott's written response of 'no' to the question regarding his desire to speak with police articulated his desire to have counsel present sufficiently clearly. *Davis*, 512 U.S. at 459. We are mindful that, if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. But here, in light of the wording of the form, we cannot conclude that a reasonable police officer would have thought that Scott was not invoking the right to counsel. The Advice of Rights form identifies several rights, including the right to counsel. The form then references the right to counsel—along with several other enumerated rights—in the written question: 'Having these rights in mind, do you wish to talk to us now?' Specifically, among the rights enumerated are the rights 'to talk to your lawyer before answering any questions' and 'to have him with you during questioning.' Both of these rights involve Scott's access to a lawyer, and both also relate to speaking with police. By requesting a response that bears 'these rights in mind,' the form elicited a response about Scott's desire to speak with police 'now' despite his right to counsel; with this right in mind, Scott indicated he did not wish to speak with the police. We hold that Scott invoked his right to counsel.

"Though we hold that Scott invoked his right to counsel, based on the facts before us, we are unable to conclude whether, after invoking his right to counsel, Scott later waived that right while in custody. Under *Edwards,* if Scott initiated further discussion with the police, he waived his right to counsel; if he did not initiate discussion, he did not waive his right to counsel and the police were barred from continuing questioning. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards*, 451 U.S. at 484. If the police do

subsequently initiate an encounter in the absence of counsel with no break in custody, the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. *McNeil*, 501 U.S. at 177 (1991). Here, there is conflicting testimony as to who initiated subsequent discussion of the robberies: the evidence offers differing accounts of whether Scott or Hutchison spoke first and what was said during the period before Hutchison transported Scott to Bartlett Jail.

"This conflicting testimony, and the lack of a factual finding on the issue, leave us unable to draw a conclusion as to whether Scott or the police initiated a discussion after Scott had first completed the form. Though the district court did find that the police initiated the second interview on May 29, the second day Scott was in custody, because of the conflicting evidence, we cannot determine whether or not Scott waived his right to counsel prior to that interview. If he did, of course, the confessions obtained during that interview are admissible as evidence. If he did not, those confessions, though obtained after Scott executed the May 29 written waiver in which he answered 'yes' to both form questions, are 'presumed involuntary and therefore inadmissible as substantive evidence at trial.'

"For all of these reasons, we reverse the district court's ruling that Scott did not invoke his right to counsel, and we remand for further factual findings to determine who—Scott or a member of the police—initiated further discussion. Because the factual findings of this remand could determine Scott's coercion claim, we do not reach the merits of his coercion claim."

SEARCH AND SEIZURE:
Consent Search; Authority to Consent

United States v. Garcia
CA7, No. 12-1805, 8/27/12

Victor Garcia had given a person who, unbeknownst to him, was working with the federal Drug Enforcement Administration $477,020 for 32 kilograms of what he thought was cocaine (it wasn't).

When Garcia was arrested, officers found a piece of paper with an address on it and went to the address. It turned out to be the home of Garcia's sister and her daughter, Garcia's 18-year-old niece. Garcia's son, a child of 8, was also present. The child's mother lived in California, and the child lived with his father in an apartment in the same apartment complex (in Palatine, Illinois) as the aunt and niece.

Two of the officers who had gone to the relatives' apartment testified at the suppression hearing. They gave essentially the same testimony: They had interviewed the two women, and the niece had told them that because Garcia was often not in his apartment during the day or even the night, she made sure that the child got to school in the morning and sometimes would wait for him in Garcia's apartment when the child came home from school if the defendant wasn't expected to be at home. She said Garcia had given her or her mother a key to the apartment and she had unlimited access

to it to take care of the child—get him ready for school, let kids into the apartment to play with him in her presence, and so forth. She was willing to allow the officers to search the apartment and told them she thought she was authorized by Garcia to allow people to enter and look through it. She signed a form they handed her, consenting to the search, and led them to the apartment and opened the door for them. They found the 13 kilograms of cocaine in 13 packages in a closet.

The question is whether officers had a reasonable belief that the niece had been authorized to allow a search of her uncle's apartment. Upon review, the Seventh Circuit Court of Appeals found, in part, as follows:

"The question of the authority of someone not the occupant of a home to consent to a search of it arises frequently but has never received a crisp general answer and probably never will. The courts typically ask whether the non-occupant who consented had 'common authority [that is, authority in common with the occupant] over or other sufficient relationship to the premises' to allow the non-occupant to consent to a search. *United States v. Matlock,* 415 U.S. 164, 171 (1974). This is a pretty empty formula. It restates the question rather than answering it. A little more helpful, though still vague, is another formulation in *Matlock:* mutual use of the property by persons generally having joint access or control for most purposes. Sharing a home is the clearest example of such joint access and control. See 4 Wayne R. LaFave, *Search and Seizure* § 8.3(a), pp. 148-49 (4th ed. 2004). But what of the common case in which someone besides the occupant or occupants of a house or an apartment or other premises—someone who does not live there (if it's a residence rather than an office)—has a key to it: a neighbor, a relative, a cleaning service, a babysitter, a dog walker, the person who feeds the cat when the homeowner is away, the building superintendent, hotel staff (if one is staying at a hotel—and some people live in hotels), or other institutional staff (many people live in retirement or nursing homes).

"If anyone with a key can permit police to search a person's home, office, hotel room, or other place of occupancy, personal privacy would be considerably diminished. Courts understandably refuse to grant the police such carte blanche. It is different, however, if an employee, relative, or neighbor is left in charge of the premises. See *United States v. Ayoub,* 498 F.3d 532, 539 (6th Cir. 2007); *LaFave, supra*, § 8.5(e), p. 235; id., § 8.6(c), pp. 248-49.

"Difficult as it is to draw the line, we can at least mark the extremes—at one extreme a couple married or unmarried (*so* much cohabitation today is non-marital) sharing a home. Each spouse or partner has the full run of the house. Each can let anyone in and authorize the visitor to look around—even to look in a closet. At the other extreme is the neighbor who has a key, the babysitter, the hotel staff: their authority over the place of residence is specific and limited; they are not authorized to compromise the resident's privacy beyond what they have to do to perform their authorized tasks. If such persons could authorize a police search, personal privacy would be gravely compromised because the average person would be afraid to refuse a police officer's request to let them into a house to which the person had a key, to search.

"We think the facts of the present case as found by the district judge place it slightly nearer the cohabitation pole. As a single, working parent of a young child, Garcia needed considerable help and some of it was given by his niece and aunt (particularly the former) in his home. He was fortunate in being able to turn for help to two relatives who were also neighbors of his. He was more likely to trust them than a non-relative. He gave them the run of the apartment to take care of the child (to get clothes for the child, for example—one of the things the niece told the officers she did in the apartment). The apartment was very small—it's not as if there had been a children's wing to which the relatives could have confined themselves when attending the child. Sometimes there were other children in the apartment, invited to play with Garcia's child—the relatives were authorized to admit them.

"Garcia's lawyer describes the niece as a mere babysitter. She was more than that. Although neither she nor her mother lived in Garcia's apartment, when they were there they were *in loco parentis.* Had the child's mother lived there, her authority to allow the search could not have been questioned. Garcia's aunt and niece together were not quite a surrogate mother, but neither were they just neighbors with a key. That Garcia kept a large quantity of cocaine in a closet of this small apartment suggests that he reposed an unusual degree of trust in his aunt and niece and thus had delegated to them a large measure of authority over the apartment when he was not there.

"The closet, moreover, contained more than packages of cocaine—contained children's clothing, obviously the clothing of Garcia's child. This fact supports an inference that the critical part of the apartment that was searched was within the scope of the niece's authority. Keeping cocaine in the closet was as we said indicative of Garcia's trust, in his aunt and niece. That the child's clothes were also kept in the closet further confirms that trust, since part of the niece's assignment was to see that the child got clean clothes and got him ready for school.

"The facts of the present case, as found by the district judge, establish at the least that the police had a reasonable belief that the niece was authorized to consent to the search; no more is needed to uphold the validity of the search."

SEARCH AND SEIZURE: **Curtilage; Emergency Search; Plain View**

United States v. Schmidt
CA7, No. 12-1738, 11/6/12

In May 2011, several Milwaukee police officers were investigating a series of gunshots that were heard near the intersection of South 10th Street and West Orchard Street. About an hour into the investigation, some of the officers learned that one person had been shot in the leg near that intersection and was recovering at a hospital. At around 1:00 a.m., an officer approached a backyard shared by two duplexes on 1420 South 10th Street and noticed bullet holes and a trail of about nine spent casings in the area, including five casings right next to one of the duplexes and a casing in the yard itself. Without a warrant, he entered the backyard and approached a corner of the yard, where he found and seized a rifle, which belonged to John E. Schmidt, Jr.

Schmidt was subsequently indicted for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). After the district court denied his motion to suppress, Schmidt pled guilty and was sentenced to 21 months' imprisonment. As permitted by his plea agreement, Schmidt appealed the denial of his suppression motion, arguing that the backyard was curtilage and that any danger had dissipated by the time of the search given the heavy presence of officers in the neighborhood and the passage of a few hours' time.

The Seventh Circuit Court of Appeals found, in part, as follows: "A reasonable officer could have believed that there were other exigent circumstances, i.e., wounded victims in the backyard in need of emergency aid, and so the officer's warrantless presence in the backyard was justified even if the backyard were curtilage. And because the scope and breech of the rifle were in plain view once he was there, we find that the officer did not violate the Fourth Amendment in seizing the rifle. Therefore, we affirm Schmidt's conviction."

SEARCH AND SEIZURE:
Parole Search; Police Requested Search
Johnson v. State, CACR 11-917
2012 Ark. App. 476, 9/12/12

On April 28, 2010, William Johnson was charged by information with possession of a controlled substance, cocaine, with intent to deliver and possession of drug paraphernalia with intent to use. At the time Johnson was alleged to have committed these offenses, he was on parole from the Arkansas Department of Correction. The conditions of his release required that he submit his person, place of residence, and motor vehicle to search and seizure at any time, day or night, with or without a search warrant, whenever requested to do so by any Department of Community Punishment officer.

In January 2011, Johnson filed a motion to suppress evidence. At the hearing on Johnson's motion, Officer Blake Bristow with the Jonesboro Police Department testified that an informant who had previously provided information to him contacted him and informed him that Johnson was going to be involved in a drug deal that day. Officer Bristow assumed that Johnson would go to his apartment prior to the transaction, and he had Officer Rick Guimond stationed along Johnson's route to conduct a traffic stop of Johnson. Officer Bristow informed Officer Guimond that he wanted to conduct a traffic stop of Johnson in order to protect his informant. Officer Bristow also contacted Michelle Earnhart, Johnson's parole officer, and requested that she assist Officer Guimond.

Officer Guimond stopped Johnson and returned him to his apartment at Earnhart's request. When Johnson was returned to his apartment, Ms. Earnhart requested that Officer Bristow perform a strip search of Johnson. During the search, Officer Bristow discovered cocaine. He also found a large amount of cash in Johnson's couch. Officer Bristow admitted on cross-examination that he had applied for a search warrant but did not mention receiving information from a confidential informant in the affidavit. He further admitted that there was no mention of a confidential informant in his report following the arrest.

Officer Guimond testified that he performed a traffic stop on Johnson on March 1, 2010. He stated that Officer Bristow had asked him to stop the vehicle. Officer Guimond testified that there were several items hanging from Johnson's rearview mirror, and he based his stop on an obstructed windshield and interior. He stated that he believed that he would have been justified in issuing a citation for the items hanging from the rearview mirror.

During the stop, he asked permission to search Johnson and his vehicle and Johnson refused. Ms. Earnhart then told Officer Guimond that they were going to Johnson's apartment to perform a parole search. Officer Guimond stated that Johnson was walking in an unusual manner, as though he were attempting to hide something in his buttocks or crotch area. Officer Guimond admitted on cross-examination that he did not mention Officer Bristow's request that he stop Johnson in his report. He stated that he left his discussion with Officer Bristow out of his report in order to protect Officer Bristow's confidential informant.

Michelle Earnhart testified that the police contacted her and requested that she assist with a search of Johnson. She stated that Johnson was walking in an unusual manner, and she asked Officer Bristow to search him.

At the conclusion of the hearing, the trial court stated that, due to Johnson's status as a parolee, he had no expectation of privacy from a search by Ms. Earnhart or any other agent of the Department of Correction and that it was denying the motion to suppress. The trial court entered a written order denying the motion to suppress on May 31, 2011. On that same day, Johnson entered a conditional plea of guilty. The trial court sentenced him to 120 months' imprisonment followed by five years' suspended imposition of sentence.

The only issue on appeal is whether the trial court erred in denying Johnson's motion to suppress. Upon review, the Arkansas Court of Appeals found, in part, as follows:

"In reviewing the denial of a motion to suppress, an appellate court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court. *Williams v. State*, 2012 Ark. App. 337. The appellate court defers to the superior position of the circuit judge to pass on the credibility of witnesses and will reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id*.

"Johnson contends on appeal that the stop of his vehicle was illegal. Johnson argues that Officer Guimond did not have probable cause to stop his vehicle and that the drugs found during the parole search by Officer Bristow should be suppressed as fruit of the illegal stop.

"Only evidence that is discovered as a result of an officer's exploitation of an illegality is subject to suppression as the fruit of the poisonous tree. *Hudspeth v. State*, 349 Ark. 315, 78 S.W.3d 99 (2002). The search that yielded the evidence Johnson sought to suppress was not done in connection with the traffic stop. That search was a parole search performed

by Officer Bristow at the request of Johnson's parole officer, Michelle Earnhart. The terms of Johnson's parole required him to submit to a search by an officer of the Department of Community Punishment at any time. Although Officer Bristow was the one who actually performed the search, both this court and our supreme court have held that a parole officer may enlist the aid of police, and a police officer may act at the direction of the parole officer without overreaching the scope of the search. *Cherry v. State,* 302 Ark. 462, 791 S.W.2d 354 (1990); *Hatcher v. State,* 2009 Ark. App. 481, 324 S.W.3d 366."

SEARCH AND SEIZURE:
Probable Cause;
Term "Child Pornography"

United States v. Pavulak, CA3. No. 11-3863

Delaware State Police obtained search warrants for Paul Pavulak's email account and workplace after receiving information that he was viewing child pornography on his workplace computers. Evidence was seized, he was convicted of possessing, 18 U.S.C. 2252A(a)(5)(B), and attempting to produce child pornography, 18 U.S.C. 2251(a) and (e), attempting to entice a minor, 18 U.S.C. 2422(b), and committing crimes related to his status as a sex offender, 18 U.S.C. 2250(a). The district court sentenced him to life imprisonment on the attempted-production conviction and to 120 months' imprisonment on the remaining counts. The Third Circuit affirmed, rejecting a claim that the evidence should have been suppressed. The warrants were supported by an affidavit that pointed to Pavulak's prior child-molestation convictions and labeled the images, which had been reported by informants, simply as child pornography. No further details concerning the images content appeared in the affidavit, which was, therefore, insufficient to establish probable cause for child pornography, but the officers reasonably relied on the warrants in good faith.

Pavulak moved to suppress the evidence because the search warrants were not based on probable cause because they did not provide the magistrate with any details about what the alleged child-pornography images depicted. In this case, the search warrant applications alleged that Pavulak was dealing in child pornography.

Upon review, the Court found, in part, as follows:

"The label 'child pornography,' without more, does not present any facts from which the magistrate could discern a fair probability that what is depicted in the images meets the statutory definition of child pornography and complies with constitutional limits. The affidavit does not describe, for instance, whether the minors depicted in the images were nude or clothed or whether they were engaged in any prohibited sexual act as defined by law. As we said in *Miknevich,* that kind of insufficiently detailed or conclusory description of the images is not enough. 638 F.3d at 183. Presented with just the label 'child pornography,' the most the magistrate could infer was that *the affiant* concluded that the images constitute child pornography.

"The problem with that inference is that identifying images as child pornography will almost always involve, to some degree, a subjective and conclusory determination

on the part of the viewer, and such inherent subjectivity is precisely why the determination should be made by a judge, not the affiant. *United States v. Brunette*, 256 F.3d 14, 18 (1st Cir. 2001). Otherwise, we might indeed transform the magistrate into little more than the cliché rubber stamp. Other circuits agree that a probable-cause affidavit must contain more than the affiant's belief that an image qualifies as child pornography.

"When faced with a warrant application to search for child pornography, a magistrate must be able to independently evaluate whether the contents of the alleged images meet the legal definition of child pornography. New York v. P.J. Video, 475 U.S. 868, 874 n.5 (1986). That can be accomplished in one of three ways: (1) the magistrate can personally view the images; (2) the search-warrant affidavit can provide a sufficiently detailed description of the images; or (3) the search-warrant application can provide some other facts that tie the images' contents to child pornography."

SEARCH AND SEIZURE:
Regulatory Traffic Stop; Consent

United States v. Orozco
CA8, No. 12-1170, 12/3/12

Efrain Orozco and another driver were driving a commercial truck with an empty flatbed trailer through Missouri. When Orozco was in a sleeping berth and the other driver was operating the vehicle, a commercial vehicle officer ("officer") stopped the truck. The parties agree that the initial stop was a permissible regulatory stop. The officer questioned the driver and collected various materials for inspection, including each man's license and log book as well as the truck's bill of lading. Upon inspecting the materials, the officer noticed several inconsistencies. The officer contacted the Missouri State Highway Patrol for assistance because the officer found the inconsistencies suspicious and because troopers with the Missouri State Highway Patrol possess greater investigatory authority than commercial vehicle officers. When a trooper arrived, the trooper spoke briefly with the officer then asked the other driver for permission to search the truck. The other driver granted permission without limitation, and he and Orozco exited the vehicle at the trooper's request.

When searching the vehicle, the trooper noticed stripped screws on a light cover, removed the screws, and discovered concealed bundles. While the trooper was conducting the search, Orozco and the other driver fled on foot. The two men were later found and arrested. A later, more thorough search revealed 62 cellophane wrapped bundles containing approximately $1.4 million (primarily in $20 bills), 2.8 kilograms of powder cocaine, and slightly over 55 grams of cocaine base.

Orozco moved to suppress the evidence seized from the truck. He conceded the initial stop was permissible. He argued, however, that the purpose of the stop shifted at some point from a permissible regulatory stop to an impermissible general investigatory stop unsupported by adequate suspicion. A magistrate judge prepared a report and recommendation denying the motion. In the report, the magistrate judge found that the regulatory stop was permissible and that the other driver's consent to search was valid.

The report then stated that the officer worked on paperwork related to the regulatory stop until such time that the trooper obtained consent such that the stop was not elongated beyond the length of time associated with the permissible regulatory purpose. The district court adopted the report in full.

The Court of Appeals for the Eighth Circuit stated that because the initial stop and the later-acquired consent were valid, Orozco cannot establish a Fourth Amendment violation in this case unless the officer impermissibly extended the stop without reasonable articulable suspicion. See *United States v. Briasco*, 640 F.3d 857, 859 (8th Cir. 2011) ("To delay a vehicle's occupants after an initial traffic stop has been completed, there must be particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed." Orozco does not point to any evidence suggesting that, before the other driver gave valid consent to the trooper, the officer extended the stop beyond that time necessary for the regulatory stop. The magistrate judge determined that the officer was working on paperwork related to the initial stop when waiting for the trooper to arrive, and Orozco does not challenge this finding. As such, the entire stop preceding the grant of consent was constitutionally reasonable.

SEARCH AND SEIZURE:
Search Warrants; Staleness Doctrine

United States v. Seiver
CA7, No. 11-3716, 8/28/12

In this case, a warrant affidavit said that authorities had discovered that a pornographic video, which a 13-year-girl had made of herself and uploaded to the Internet, had been downloaded to a computer at Seiver's home and that images from that video had been uploaded from that computer to an image-sharing website. A Facebook message with a link to that website had been sent to the girl's stepmother from the same computer. Authorities identified the computer's Internet Protocol address as registered to Seiver.

Seiver argued that the facts were stale and that there was no reason to believe that seven months after he had uploaded child pornography there would still be evidence of the crime on his computer. The Seventh Circuit affirmed the trial court's decision, finding in part, as follows:

"Staleness is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. Computers and computer equipment are 'not the type of evidence that rapidly dissipates or degrades.' *United States v. Vosburgh,* 602 F.3d 512, 529 (3d Cir.2010). Because of overwriting, it is possible that the deleted file will no longer be recoverable from the computer's hard drive. And it is also possible that the computer will have been sold or physically destroyed. And the longer the interval between the uploading of the material sought as evidence and the search of

the computer, the greater these possibilities. But rarely will they be so probable as to destroy probable cause to believe that a search of the computer will turn up the evidence sought; for probable cause is far short of certainty—it 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,' *Illinois v. Gates,* 462 U.S. 213, 244 n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and not a probability that exceeds 50 percent ('more likely than not'), either. *Hanson v. Dane County*, 608 F.3d 335, 338 (7th Cir.2010). Notice too that even if the computer is sold, if the buyer can be found the file will still be on the computer's hard drive and therefore recoverable, unless it's been overwritten. The search warrant will have designated the premises where the computer was expected to be found, and though a computer sold by the occupant will obviously no longer be there, evidence may be found there of the buyer's identity.

"Computer procedures such as 'defragmenting,' 'wiping,' and creating 'garbage files' can make deleted computer files very difficult or even impossible to recover. *Lange & Nimsger,* supra, at 221–24. And encryption may hide files remaining on the hard drive so effectively as to thwart their recovery by computer experts. *Kendall & Funk,* supra, at 167. Software that wipes the hard drive or overwrites deleted files with garbage data can be bought on line. But it appears that few consumers of child pornography (the producers may be more savvy) understand well enough how their computer's file system works to grasp the importance of wiping or overwriting their deleted pornographic files or encrypting them securely if they want to avoid leaving recoverable evidence of child pornography in their computer after they've deleted it. Anyway this way of thwarting a search has nothing to do with staleness. A child pornographer who wants to render computer files nonrecoverable will first download those he wants to keep to a DVD, which can be hidden outside his home, and then either destroy the computer and get a new, 'clean' one, or take steps to assure the complete overwriting of the contents of his hard drive. Nevertheless, despite the availability of software for obliterating or concealing incriminating computer files, the use of such software 'is surprisingly rare.' *Kendall & Funk*, supra, at 276.

"No doubt after a very long time, the likelihood that the defendant still has the computer, and if he does that the file hasn't been overwritten, or if he's sold it that the current owner can be identified, drops to a level at which probable cause to search the suspect's home for the computer can no longer be established. But seven months is too short a period to reduce the probability that a computer search will be fruitful to a level at which probable cause has evaporated.

"Some cases, illustrated by *United States v. Allen,* supra, 625 F.3d at 843, say it's important that the search warrant affidavit apprise the magistrate asked to issue the warrant that deleted files are recoverable. That may be prudent, because some magistrates may not know a great deal about computers, but it shouldn't be required to make the warrant valid; it is or should be common knowledge.

"Now it is true that after deleting a file and emptying the trash bin containing it, a computer owner who is not technologically

sophisticated no longer 'possesses' the file in a meaningful sense, see, e.g., *United States v. Moreland*, 665 F.3d 137, 152 (5th Cir.2011), and the crime of which the defendant was committed requires knowing possession. Had the defendant deleted the incriminating files (and emptied his trash folder with those files in it), he would no longer have knowingly possessed them if, as in *Moreland*, he could no longer access them because he lacked the software that he would have needed to be able to recover them from the hard drive's slack space. *United States v. Flyer*, supra, 633 F.3d at 918–20. But this need not have eliminated probable cause for a search of his computer unless the statute of limitations on possession had expired by the time the search was conducted, which it had not done in this case. See *United States v. Kain,* 589 F.3d 945, 948–50 (8th Cir.2009).

"The most important thing to keep in mind for future cases is the need to ground inquiries into 'staleness' and 'collectors' in a realistic understanding of modern computer technology and the usual behavior of its users. Only in the exceptional case should a warrant to search a computer for child pornography be denied on either of those grounds (there are of course other grounds for denial). But future changes in computer technology may alter this conclusion, and judges as well as law enforcers must be alert to that possibility as well."

SEARCH AND SEIZURE: **Seizure of Persons; Voluntary Cooperation**

Green v. State, CR 11-1269
2012 Ark. 347, 9/27/12

Charles Wayne "Chad" Green was convicted of four counts of capital murder and one count of kidnapping. He received life sentences for each count of capital murder and a forty-year sentence for the count of kidnapping. On appeal, one of his contentions was that, because the police failed to inform him that he was under no legal obligation to comply with their request to speak with them, Arkansas Rule of Criminal Procedure Rule 2.3 was violated and any subsequent statements to police should have been suppressed.

The Arkansas Supreme Court found, in part, as follows:

"While Rule 2.3 of the Arkansas Rules of Criminal Procedure does not require an explicit statement that one is not obligated to appear or remain at a police station, see *Baker v. State,* 363 Ark. 339, 341, 214 S.W.3d 239, 240 (2005), if a law enforcement officer acting pursuant to the Rule requests any person to come to, or remain at, a police station, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request. Ark. R. Crim. P. 2.3 (1998).

"This court views verbal admonition of freedom to leave as one factor to be considered in our analysis of the total circumstances surrounding compliance with Rule 2.3. *Baker,* 363 Ark. at 341, 214 S.W.3d at 240. When interpreting Rule 2.3, this court

looks to the criteria set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980), to determine whether a person has been seized within the meaning of the Fourth Amendment to the United States Constitution.

"The Court has held that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Mendenhall*, 446 U.S. at 554–55.

"The murders and kidnapping in this case took place on or about July 29, 1998. Rob Samons, the Randolph County Sheriff at the time of the crimes, testified at the suppression hearing that when he took Chad's statement on August 8, 1998, he and other police officers 'were just trying to talk to anybody that we knew of that might have been associated with, acquainted with, or in the area of where the Elliotts lived.' Samons stated that, after police learned that Chad might have been a friend or acquaintance of the Elliotts, he or another law enforcement officer left a message for Chad and requested that he come to the sheriff's office. Samons testified that Chad came to the sheriff's office voluntarily and that he spoke to Chad in his personal office, where the door was not locked. According to Samons, he and Chad were the only ones present, Chad was not handcuffed, and he did not threaten or coerce Chad in any way. Samons testified that Chad was free to leave at any time and that he did not ask for an attorney. Samons stated that he did not *Mirandize* Chad because, at that time, police were just talking to anyone who might have information that could assist in the investigation. Chad gave Samons an exculpatory statement, which Samons noted and Chad signed. Chad left the sheriff's office after giving the statement. Samons testified that he could not remember if he had complied with Rule 2.3.

"Chad testified at the suppression hearing that, after he received a message that police wanted to speak to him, his mother took him to the sheriff's office. He said the police made it a point that he needed to show up. He said that when he arrived at the sheriff's office, he was not informed that he was not required to comply with the request to come there.

"Chad asserts that his August 8 statement should be suppressed because there is no evidence that the police complied with Rule 2.3. We disagree. Although Samons could not say whether he complied with Rule 2.3, his testimony indicates that he took steps to make it reasonably clear to Chad that he had no obligation to comply with the request to talk. Although Chad testified that the police had made it a point that he needed to show up, the circuit court is not required to believe the testimony of any witness, including the accused. We hold that the circuit court's denial of Chad's motion to suppress his August 8 statement is not clearly against the preponderance of the evidence."

SEARCH AND SEIZURE: **Stop of Persons; Handcuffing During Detention**

United States v. Rabbia
CA1, No. 11-1510, 11/7/12

Detective Derek Sullivan of the Manchester, New Hampshire, Police Department approached a Civic automobile alone with his weapon drawn. From where he stood, Sullivan could only see Anthony Rabbia's upper body and could not determine if he was armed. Sullivan instructed Rabbia to exit the car. When he complied, Sullivan placed him in handcuffs. As he did so, Sullivan told Rabbia that he was not under arrest, that he was being handcuffed as a safety measure, and that the handcuffs would be removed when other officers arrived. Rabbia indicated that he understood. Sullivan then pat-frisked Rabbia for weapons and found none. During the frisk, Sullivan reiterated that Rabbia had been handcuffed as a precaution and that the handcuffs would be removed when additional officers appeared.

Shortly thereafter, another officer arrived on the scene and, as promised, Rabbia's handcuffs were removed. In all, he had been handcuffed for approximately five minutes. Detective Sullivan thought he had been observing a drug transaction when, in fact, it was a firearms transaction.

After a records check revealed that Rabbia had previously been convicted of felonies, he was formally arrested for unlawful possession of a firearm and ammunition following a felony conviction.

Rabbia argues that the stop, even if lawful at its inception, evolved into a *de facto* arrest long before he was formally arrested. Upon review, the First Circuit Court of Appeals found, in part, as follows:

"Whether a *Terry* stop has escalated into a *de facto* arrest depends on a number of factors, including the location and duration of the stop, the number of police officers present at the scene, the degree of physical restraint placed upon the suspect, and the information conveyed to the suspect. Above all, an inquiring court must bear in mind that it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties

"Rabbia contends that the combination of Sullivan's display of his service weapon, his use of handcuffs, and his pat frisk quickly transformed his stop into a *de facto* arrest. As a result, he asserts that he should have been advised of his Miranda rights before Sullivan began questioning him in the parking lot.

"While we have held that none of these measures, considered individually, necessarily converts a valid *Terry* stop into a *de facto* arrest, the presence of all three in a single encounter warrants a careful examination of the facts. When addressing the use of handcuffs, we have looked for some specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing officers, the public, or the suspect himself to an undue risk of harm. Specific facts or circumstances justifying the use of officer safety measures must be present when the use of handcuffs is combined with other indicia of arrest.

"The intrusiveness of the measures taken is only part of the equation. When officer safety is a legitimate concern, these prophylactic measures can be employed, even in combination, without exceeding the constitutional limits of a Terry stop. In this case, Rabbia was stopped because of a reasonable suspicion that he was trafficking in drugs, which suggested to Sullivan that he might be armed, given that drug dealing is often associated with access to weapons. Because Rabbia was seated in his car, the lower half of his body was not visible as Sullivan approached him, and he easily could have been concealing a weapon. What is more, Sullivan was effectively alone in confronting Rabbia. Under these circumstances, there was good reason for Sullivan to fear that Rabbia was armed and dangerous, and to neutralize the risk of harm by drawing his weapon, applying handcuffs, and conducting a pat-frisk.

"Moreover, other relevant facts support the conclusion that Sullivan's prophylactic measures did not transform Rabbia's stop into an arrest. Rabbia was stopped and detained in a parking lot abutting a busy public alleyway. The officer explicitly informed Rabbia that he was not under arrest, that he was being handcuffed as a safety measure and that the handcuffs would be removed when other police officers arrived, which should have clarified the circumstances to a reasonable person. The handcuffs were, in fact, removed as soon as another officer appeared.

"The relative brevity of Rabbia's detention further undermines the notion that he was *de facto* arrested. The handcuffs remained on him for only five minutes. Rabbia was detained for only thirty minutes or thereabouts before being formally arrested. We acknowledge that the use of measures such as handcuffs or drawing guns are among the most recognizable indicia of a traditional arrest. The circumstances that we have identified, however, indicate that the stop at issue here, while intrusive, was both proportional to the occasion and brief in duration.

"Therefore, the district court properly declined to grant Rabbia's suppression motion."

SEARCH AND SEIZURE:
Traffic Violation; Probable Cause; Custodial Interrogation; Motor Home

United States v. Coleman
CA8, No. 12-1400, 11/8/12

On July 31, 2010, Thomas Coleman was driving his motor home on Interstate 80 in Hall County, Nebraska. Nebraska State Patrol Trooper Jason Bauer observed two vehicles with Florida license plates traveling eastbound on Interstate 80 under the posted speed limit. Trooper Bauer began following the vehicles and observed the second vehicle, Coleman's motor home, swerve. The passenger-side tires of the motor home twice crossed over the fog line at the shoulder of the highway. Trooper Bauer stopped Coleman for driving on the shoulder.

Trooper Bauer asked Coleman to sit with him in his patrol car while the officer wrote a warning citation and checked Coleman's license status and criminal history. Trooper Bauer questioned Coleman about his travel plans and whether he had a criminal history, which Coleman denied. The state patrol dispatch was unable to check Coleman's criminal history with only a name and date

of birth so Trooper Bauer relayed Coleman's social security number. Dispatch responded, and Trooper Bauer learned Coleman had an extensive criminal history, including drug, robbery, and weapons offenses. Trooper Bauer again asked Coleman if he had ever been arrested, and Coleman again said he had not. When Trooper Bauer questioned Coleman about drug use, Coleman admitted he used medically prescribed marijuana while in California a few months prior. Trooper Bauer inquired if Coleman had any medical marijuana with him. Coleman replied that he did in the front part of the motor home. Trooper Bauer then placed Coleman in the backseat of his patrol car while he entered the motor home.

Trooper Bauer entered the motor home through the passenger-side door where Coleman had exited the vehicle. Trooper Bauer conducted a sweep of the motor home to ensure it was unoccupied. In a large compartment under the bed, Trooper Bauer located a black weapons-type bag. Trooper Bauer opened the bag and discovered a high-point rifle and ammunition. Trooper Bauer confirmed with dispatch that Coleman was a convicted felon. Trooper Bauer then located marijuana in the front of the motor home.

On October 19, 2010, a grand jury charged Coleman with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Coleman moved to suppress the evidence obtained from the stop and the search of the motor home. After a hearing, the magistrate judge recommended denial of Coleman's motions because (1) Trooper Bauer had probable cause for the stop, or alternatively the stop was a lawful investigatory detention under Terry v. Ohio, 392 U.S. 1 (1968); (2) any extension of the stop was de minimis, and justified by reasonable suspicion; (3) the search of the motor home was justified by probable cause and also as a protective sweep necessary for officer safety; and (4) Coleman was not "in custody" for Miranda purposes when Trooper Bauer questioned him. On September 29, 2011, Coleman entered a conditional guilty plea, reserving his right to appeal the district court's suppression decision.

Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"A traffic violation, no matter how minor, provides an officer with probable cause to stop the driver. The district court found credible Trooper Bauer's testimony that he twice observed Coleman swerve over the fog line separating the right lane of the highway from the shoulder. Coleman argues momentarily crossing onto the shoulder does not constitute a violation of the statute and therefore the trooper lacked probable cause to stop Coleman's vehicle. We disagree.

"A constitutionally permissible traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete' its purpose. An officer may detain the occupants of a vehicle while performing routine tasks such as obtaining a driver's license and the vehicle's registration and inquiring about the occupants' destination and purpose. If the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion. Reasonable suspicion is a particularized and objective basis for suspecting criminal activity.

"Coleman argues Trooper Bauer's questioning regarding drug use improperly exceeded the scope of a normal traffic stop. We disagree. Trooper Bauer justified in asking Coleman about drug use in order to eliminate drug use as a possible cause of Coleman's swerving. Thereafter, Coleman's dishonesty regarding his criminal history reasonably raised Trooper Bauer's suspicions and prompted him to ask clarifying questions. Even if Trooper Bauer lacked reasonable suspicion to extend the questioning, any intrusion on Coleman's Fourth Amendment rights was de minimis. Coleman's traffic stop was permissibly prolonged for a brief period because the state patrol dispatch was unable to obtain Coleman's personal history information by using only his name and date of birth. After Trooper Bauer provided Coleman's social security number to dispatch and received Coleman's criminal history, Trooper Bauer's additional questioning was brief, lasting only a couple of minutes. We have upheld such short detentions as minimum intrusions.

"Coleman argues his Fifth Amendment rights were violated when Trooper Bauer questioned him without first advising Coleman of his *Miranda* rights. *Miranda* warnings are required when an individual has been subjected to custodial interrogation. Although a motorist is technically seized during a traffic stop, *Miranda* warnings are not required where the motorist is not subjected to the functional equivalent of a formal arrest. The district court found Coleman was seated in the front seat of Trooper Bauer's patrol car when he was questioned. Coleman was not handcuffed and had not been told his detention would be anything other than temporary. Trooper Bauer's tone was conversational and the questions were limited in number and scope. Based on the totality of the circumstances, the district court did not err when it found Coleman was not subjected to restraints comparable to those of a formal arrest. Trooper Bauer was not required to give *Miranda* warnings before questioning Coleman.

"Officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains contraband. This automobile exception applies equally to motor homes. See *California v. Carney*, 471 U.S. 386, (1985). Coleman told Trooper Bauer there was marijuana in his vehicle, providing probable cause to search the vehicle for drugs. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

"Trooper Bauer could lawfully search every part of the motor home where marijuana might have been, including under the bed where the weapon was found. Assuming the trooper lacked probable cause to search beyond where Coleman told him the marijuana was located in the motor home, the trooper was justified, at the time, in performing a protective sweep to make sure no passengers were hiding in the motor home.

"Coleman argues the motor home was more like a residence than a vehicle, and as such, the sweep should have been limited to the space within Coleman's immediate control. However, a motor home in transit on a public highway is being used as a vehicle and is therefore subject to a reduced expectation of privacy. In the context of a traffic stop, we have repeatedly held officers may take such additional steps as are reasonably necessary to

protect their personal safety and to maintain the status quo during the course of the stop. The district court found that the space under the bed was large enough to hide a person, and the sweep justifiably could extend to this area for the officer's protection from a possible hidden assailant.

"Once Trooper Bauer observed the weapons-type bag in plain view during the lawful protective sweep, and the bag was readily identifiable as a gun case, the trooper had probable cause to believe the bag contained contraband because Trooper Bauer knew Coleman's criminal history included felony offenses. Because the search of the motor home was conducted with probable cause, and was reasonable otherwise, the district court did not err in finding Coleman's Fourth Amendment rights had not been violated."

SEARCH AND SEIZURE: **Vehicle Search**

Harris v. State, No. CACR 12-305
2012 Ark. App. 674, 11/28/12

This case began when Jasmine Owens alerted a 911 dispatcher that Harris had attempted to sexually assault her at his home. Renee Jones, a deputy sheriff, was notified that Harris was driving a black pickup truck and that Owens's purse, shoes, and jacket were in Harris's vehicle. Deputy Jones, while on patrol, saw a black pickup pass her on the highway; she reversed, followed, and pulled the truck over for driving left of center. Harris was the driver, and Deputy Jones ran his driver's license number and discovered that Harris had outstanding felony warrants. Two other officers arrived at the scene and arrested Harris on the warrants.

After Harris was in custody, officers searched his vehicle and found brass knuckles and Owens's purse and shoes. Officers later found drugs in the backseat of the patrol car in which Harris was transported. One of the issues in this case dealt with the search of the truck. The Arkansas Court of Appeals found, in part, as follows:

"Harris argues that his motion to suppress the evidence found in his truck should have been granted. Under *Arizona v. Gant,* when an 'arrestee has been secured and cannot access the interior of the vehicle…circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.' 556 U.S. at 335. Harris argues that after the traffic stop, when he was arrested on outstanding felony warrants, the police were precluded from searching his vehicle without a warrant because there was no reason for them to believe evidence of that offense would be found in the vehicle.

"Here, officers had probable cause to believe Harris had outstanding felony warrants—his arrest, therefore, was justified on those grounds. If this was the whole story, the officers would likely have been precluded from using the search incident to arrest exception to search his vehicle. But before the officers conducted the search, they had received information from Owens that her purse and shoes were in Harris's truck. *Gant* states the following: If there is probable cause to believe a vehicle contains evidence of criminal activity a search of any area of the vehicle in which the evidence might be found is authorized. 556 U.S. at 347 (citing *United States v. Ross,* 456 U.S. 798 (1982)).

Officers may search a vehicle when safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. The information from Owens about the whereabouts of her personal items gave the officers a reason to believe Harris's truck contained evidence of sexual assault. In other words, the police had probable cause to believe the truck contained evidence of criminal activity, and the circuit court's denial of Harris's second motion to suppress was not clearly against the preponderance of the evidence."

SECOND AMENDMENT: **Age Restriction on Handgun Sales**

National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, CA5, No. 11-10959, 10/25/12

The United States Court of Appeals for the Fifth Circuit held that the Federal law that prohibits federal firearms licensees from selling handguns to people under the age of 21 does not violate the Second Amendment.

SIXTH AMENDMENT: **Confrontation Clause; BAC Datamaster Calibration**

Chambers v. State, CR 12-538
2012 Ark. 407, 11/1/12

Derek D. Chambers was convicted of driving while intoxicated (DWI) and following too close. He appealed his conviction for DWI, arguing that the circuit court erred in allowing testimony regarding the administration and results of his breathalyzer test because the person who calibrated the machine was not made available to testify, which violated his Confrontation Clause rights.

The Arkansas Supreme Court held that calibration records of a breathalyzer machine are not testimonial, and thus the admission of those records without the testimony of the person who performed the calibration does not violate the Confrontation Clause. The Court further stated that if Chambers wished to cross-examine the person who performed the certification of the BAC Datamaster, he could have subpoenaed that person.

SUBSTANTIVE LAW: **Joint Possession; Constructive Possession**

Bustillos v. State, No. CACR 12-260
2012 Ark. App. 260, 11/14/12

Christian Leon Bustillos and Ivan Leon Bustillos, who are brothers, appeal from their convictions by a Lonoke County jury for possession of a controlled substance, cocaine, with intent to deliver. The Arkansas Court of Appeals affirmed the judgment of the trial court as to Ivan Bustillos, reversed the judgment of the trial court as to Christian Bustillos, and dismissed the charge against Christian Bustillos.

At the trial, Sergeant Dennis Overton with the Arkansas State Police testified that on December 18, 2011, he pulled over an older-model, white, two-door sport-utility vehicle with an Arizona license plate traveling on Interstate 40. Ivan was the driver and Christian was riding in the front passenger's seat. Sergeant Overton stopped the vehicle for impeding the flow of traffic and failure to signal a lane change. The vehicle was registered to Ivan and had been registered only two days before in Arizona. The insurance policy on the vehicle was a thirty-day policy. Sergeant Overton testified that

recently purchased vehicles are often used by people trafficking narcotics. Although appellants indicated to Sgt. Overton that they were traveling from Arizona to Indiana to visit a third brother, they were carrying what the sergeant described as a very small amount of luggage. Both men drove the vehicle during the trip. There were also new Marine Corps stickers on the back of the vehicle, which Sergeant Overton explained are commonly used as "disclaimers"—items on or inside a vehicle that are aimed at earning approval from law—enforcement officials. Christian had previously served in the Marine Corps.

Sergeant Overton testified that he took Ivan to his vehicle to speak with him and, during the conversation, Ivan was extremely nervous and sweating profusely. According to Sergeant Overton, Christian was very nervous as well; he would not make eye contact with Overton. Sergeant Overton stated that the level of nervousness the men displayed was different from that which people usually display during a traffic stop. Ivan told the sergeant that they were going to visit their brother in Indiana because he had been in a car accident, although he had only sustained bumps and bruises. Ivan gave consent for Sergeant Overton to search the vehicle. Ivan told Sergeant Overton that he had purchased the vehicle from a friend.

Christian indicated to Sergeant Overton that he did not know how Ivan had purchased the vehicle. Ivan told Sergeant Overton that they would be staying with their brother and that no one else would be there; however, Christian told the sergeant that they might be staying in a hotel because there were going to be a bunch of people at their brother's home. While he was searching the vehicle, Sergeant Overton noticed that the carpet inside the vehicle had been moved. He also noticed that the back seat of the vehicle had been removed very recently. He stated that he knew this because the bolts holding the seat in place had recently been removed. Ivan told Sergeant Overton that he had some work done on the vehicle after he bought it due to problems with the starter or battery. When he shined a light into the interior side molding, Sergeant Overton saw spray-foam insulation, which he testified is an indication that there are narcotics in the vehicle. He further testified that the foam had recently been put inside the vehicle. When he used a fiber-optic scope inside the seatbelt well on the driver's side, he saw a green bundle. A bundle was not visible on the passenger's side. At that point, Sergeant Overton placed both men under arrest. After the car was taken to a shop, three bundles of cocaine were removed from the interior. Two of the bundles were located on the driver's side and one bundle was located on the passenger's side. Gene Bangs with the Arkansas State Crime Laboratory testified that 3008.5 grams of cocaine were removed from the vehicle.

Upon review, the Arkansas Court of Appeals found, in part, as follows:

"Constructive possession may be implied when contraband is in the joint control of the accused and another person. Joint occupancy of an ordinary passenger vehicle, standing alone, is insufficient to establish possession or joint possession; there must be some other factor linking the accused to the contraband. In cases involving automobiles occupied by more than one person, such additional factors include (1) whether the contraband is in plain view; (2) whether the contraband

is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. Constructive possession may be established by circumstantial evidence. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

"We hold that the jury verdict finding Ivan Bustillos guilty of possession of a controlled substance with intent to deliver is supported by substantial evidence. The cocaine was found in a vehicle that was registered to Ivan. The vehicle was covered by an insurance policy that only lasted thirty days. The cocaine was found in a location that would take time and effort to access and was hidden in a manner that would not have been possible for a transient passenger. Furthermore, Sgt. Overton gave specific details regarding how Ivan appeared nervous during the stop, specifically that he exhibited an extremely elevated heart rate and was sweating profusely despite the cold temperature. This evidence raises a reasonable inference that Ivan possessed the cocaine found in the vehicle.

"An analysis of the evidence against Christian compels a different result. The State submitted evidence that Christian was a passenger in the vehicle in which the drugs were found encased in foam inside the interior body molding and that Christian had driven the vehicle during the trip from Arizona to Arkansas. He did not own the vehicle. Driving the vehicle during the trip from Arizona to Arkansas to relieve Ivan was the extent of his control over the vehicle. Although cocaine was found on both sides of the vehicle, it was sufficiently well hidden that Christian could not have been aware of its presence simply by riding in or driving the vehicle. There was no evidence that Christian had been in or around the vehicle before the trip. Sergeant Overton testified that Christian was nervous, but, in describing Christian's nervousness, could point only to the fact that Christian did not make eye contact with him.

"Viewing the evidence in the light most favorable to the jury's verdict, it is insufficient to raise a reasonable inference of knowledge of the contraband, which is necessary in cases involving joint occupation of a vehicle. The jury was required to resort to speculation and conjecture to conclude that Christian possessed the cocaine found in the vehicle. Because the State failed to put before the jury substantial evidence that Christian possessed the cocaine, we hold that the trial court erred by denying his motion for directed verdict, reverse his conviction for possession of cocaine with intent to deliver, and dismiss the charge against him."